IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2309 of 1978

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VALLABH GLASS WORKS LTD

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 2309 of 1978

Mr Asrani for Petitioners No. 1-2

MR D.N.Patel for Respondents No. 1-2

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and

MR.JUSTICE D.H.WAGHELA

Date of decision: 07/12/2001

CAV JUDGEMENT

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

1. This petition under Article 226 of the Constitution of India was decided by this Court on 21.4.1980 in favour of the petitioner by holding that cost of wooden containers in which the petitioner's manufactured excisable item falling under Tariff Entry 23A i.e.glass is packed and marketed is not liable to be included in the assessable value of the manufactured product in accordance with section 4 (4) (d) of the Central Excises and Salt Act,1944 as it stood at the relevant time. The opinion expressed by this court was that the wooden containers in which the assessee's various products were packed could not form part of value of the glass product.

2. Union of India through the excise department carried the matter to the Supreme court in Civil Appeals Nos. 3119-20 of 1980 and the Supreme court by its judgment dated 28.7.1995 allowed the appeal of the Union of India resulting into setting aside of the order dated 21/4/1980 of this court delivered on the said legal question. The Supreme court has remanded the matter to this court with directions that question of includibility of value of wooden containers in the assessable value of manufactured glass item be decided afresh in the light of decision of the Supreme court in the case of Government of India vs. Madras Rubber Factory Limited, (1995) 77 ELT 433 (SC).

3. In the order of remand, the Supreme court has specifically made a further direction that this court should decide afresh whether or not on the evidence laid in the case, the wooden containers could be described as `durable and returnable' as that would determine the question of includibility or otherwise of the value of wooden containers in the assessable value of the manufactured glass items.

4. The provisions of the Central Excise Act at the relevant time in section 4 (4) (d) defined the word `value' for the purpose of levy of excise duty as under:

"4. Valuation of excisable goods for purposes of

charging of duty of excise-

x x x x x

(4) For the purpose of this section-

(a) x x x

(b) x x x

(c) x x x

(d) "value" in relation to any excisable goods.-

(i) where the goods are delivered at the time of removal in a packed condition,includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee".

5. Use of word `returnable' in section 4 (4)(d) (i) of the Act came up for interpretation and construction, for understanding its meaning and applicability to the facts of a given case, in the decision of the Supreme court in K.Radha Krishnaiah vs. Inspector of Central Excise (1987) 2 SCC 455. It was held that the word `returnable' does not merely mean physical capability of it being returned. It was held that `it postulates an arrangement under which packing is returnable'. The Supreme court laid emphasis on the expression used in the section defining `value'- `returnable by the buyer to the assessee'. It was held -

"The packing must be one which is returnable by the buyer to the assessee and obviously that must be under an arrangement between the buyer and the assessee. It is not the physical capability of the packing to be returned which is the determining factor because, in that event,the words `by the buyer to the assessee' need not have found a place in the section; they would be superfluous. What is required for the purpose of attracting the applicability of the exclusion clause in section 4 (4) (d) (i) is that the packaging must be returnable by the buyer to the assessee. The question which has to be asked in each case is: Is the packing in this case

returnable by the buyer to the assessee and obviously it cannot be said that the packing is returnable by the buyer to the assessee unless there is an arrangement between them that it shall be returned."

6. In the case of MRF (supra) on the basis of which this case has been remitted to this court for a fresh decision after examining the evidence, the test laid down for deciding the question of includibility of packing in the assessable value of manufactured item is as under :

"The test is: whether packing, the cost whereof is sought to be included is the packing in which it is ordinarily sold in the course of a wholesale trade to the wholesale buyer. In other words, whether such packing is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory sale. If it is ,then its cost is liable to be included in the value of the goods; and if it is not, the cost of such packing has to be excluded. Further, even if the packing is "necessary" in the above sense, its value will not be included if the packing is of a durable nature and is returnable by the buyer to the assessee. We must also emphasise that whether in a given case the packing is of such a nature as is contemplated by the aforesaid test, or not, is always a question of fact to be decided having regard to the facts and circumstances of a given case."

7. In the case of MRF (supra), when such packing material was sought to be excluded from the assessable value on the ground that it was durable and returnable, relevant discussion on the evidence that was found to be insufficient for accepting the contention of the assessee, is to be found at page 464 as under :

"The Assistant Collector rejected both the contentions on the following reasoning: (a) in the instant case, the company has not adduced any evidence to show that there are any agreements or

contracts between it and its buyers for return of such packings; (b) as a matter of fact, the goods in question are invariably delivered to their customers packed in cartons/cardboard boxes;(c) the unit of sale for the said goods for which the company files its price lists from time to time is a wholesale package comprising of dozen or gross pieces;(d) the packing of such goods in cartons/ cardboard boxes is indispensable as in the absence of the same,they cannot be conveniently delivered to the customers;(e) not a single instance could be shown where the assessee ever delivered the goods without the above packing and (f) the assessee contended that its buyers are not returning such packages to it on account of the cost of transportation. We are of the opinion that on the above findings recorded by the Assistant Collector , the only conclusion that can follow is that the cost of the cartons/cardboard boxes cannot be excluded from the value of the goods. If however, the assessee wishes to challenge the correctness of the findings of fact recorded by the Assistant Collector, the proper course is to file an appeal as provided by law."

9. In the present case, learned counsel Mr S. H. Asrani appearing for the petitioner took us through various orders of the excise authorities and the records made available at the time of assessment. It is stated that no further evidence other than already led before the excise authorities has been produced before us although the matter has been pending long before this court after remand. Learned counsel points out that the petitioner company having been declared sick is now under BIFR for reconstruction and that is the reason why no existing material or evidence or fresh evidence could be produced in this case. In our opinion, such an excuse is besides the point. We have,therefore, to decide this long pending case on the evidence available on record of the proceedings before us. The case of the petitioner is that it has two separate manufacturing units in the same premises, one for manufacture of glass and the other for manufacture of wooden containers. Both are separately licensed units. The glass being manufactured at the factory gate is supplied in naked form or in wooden containers as per the desire of the buyers. Nature of wooden containers is such that they are durable and returnable. Therefore, in accordance with provisions of section 4 (4) (d) (i) of the Act, the value of wooden

containers cannot be included in the assessable value of manufactured excisable item- glass.

10. There is on record of the case, report of the Superintendent of Central Excise , Assessment and Inspection, Amul, Anand ,dated 28.9.1977 which reads:

"During the month , though the clearances were made of naked glass from works No.2 after payment of duty to the adjoining packing section licensed for wooden boxes covered under Cen. Excise T.I. No. 68 which is not the part of works No.2 but within the same factory premises known as Shree Vallabh Glass Works Ltd., Vallabh Vidyanagar , the same do not change any position and the facts remain that both these units i.e. glass manufactured unit and packing section are of one and the same manufacturer namely Shree Vallabh Glass Works Ltd, Vallabh Vidyanagar and that the excisable goods i.e. sheet glass,figured glass, wired glass etc. are sold/ delivered to the buyers normally and ordinarily only after packing. Even the assessee vide their letter No. VGW.2/MBP/14743 dated 10.3.1976 have declared on oath that they are the owners of both the units and the accounts etc. are maintained commonly for both the units and that the wooden boxes manufactured by them are used by them for the packing of glass.

Thus, the cost of packing for the glass cleared during the monthly would form the part of assessable value. Such packing charges charged and billed from the buyers by the assessee amounting to Rs. 3,56,306.51 as per the work sheet attached and the duty of excise @ 3% adv.works out on such charges to Rs.1,06,891.95 so not paid while clearing the excisable glass as indicated above,should be paid up by the assessee within 10 days by debiting in their account current (PLA)."

11. The contents of this inspection note have been challenged in this petition and the contention initially advanced and now reiterated before us is that the glasses were marketed by the petitioner without packing. Glass is despatched in the wooden boxes as per the requirements of the buyers from works No.4 . It is sold without packing also from works No.2 where the glass is

manufactured. The wooden containers are durable and they have been transported from one place to another for nearly 8 to 10 times. It is stated that such evidence of return of boxes was produced before the excise authorities. It was also shown that the packages so returned were again used for packing. It is also pointed out that one of the conditions for sale specifically read: The boxes are returnable and durable. If returned in good condition, the amount shall be returned to the dealer'. It is submitted in the rejoinder to the affidavit in reply before us that photographs and other evidence about durability and returnability of the wooden containers was produced before the authorities but they did not apply their mind to the facts of the case.

12. The above assertion made in rejoinder to the reply affidavit and before us of existence of such evidence of actual return of packing material and its re-use is not borne out from various orders passed by the excise authorities.

13. A notice to show cause why cost of packing should not be included in the assessable value was issued to the petitioner company as back as on 11.10.1976 to which a detailed reply was submitted by the company on 1.12.1976. Nowhere in the reply ,as is required under the dictum of the Supreme court in K. Radha Krishnaih (supra), any arrangement or agreement between the buyers and the assessee is produced to show that wooden containers could be returned . The order in original passed by the Assistant Collector of Central excise does not make any mention of any such agreement or arrangement to be existing or it having been produced before him. No such attempt was made even in appeal before the Appellate Authority to show that in fact in the course of manufacture and sale of manufactured item at the factory gate, any such arrangement for return of wooden containers existed. No such attempt was made even in appeal before CEGAT and the order of CEGAT is also silent on the point.

14. In our opinion, the petitioner has miserably failed to produce any relevant evidence or material to satisfy the test laid down by the Supreme court in the cases of MRF and K. Radha Krishnaiah (supra). Wooden containers may be durable but they cannot be held to be returnable unless there existed an agreement or arrangement between the buyer and seller of such return. In our considered view, excise authorities were right in taking into consideration the nature of manufacture,

business and trade in glass items.It was rightly held that glass being brittle and easily breakable, it is deliverable for trade after manufacture only in packed condition and,therefore, packages are liable to be included in the assessable value. In fact, the petitioner sought exclusion of the value of packages on the ground that they would be durable and returnable. Burden was on them to prove that any such arrangement or agreement actually existed between the buyer and the assessee and in normal course of trade and manufacture, wooden containers in which glasses were supplied in packed condition were returned. We are also of the view that the word `returnable' postulates some kind of agreement or arrangement as held by the Supreme court.It is only such packages, which are generally returnable in the nature of manufacture and trade, are excludible from the assessable value.

For the aforesaid reasons, we dismiss the petition and uphold the impugned orders of the excise authorities. Rule is discharged. In the facts and circumstances of the case,however, we make no order as to cost.

(D. M. Dharmadhikari, C.J.)

(D. H. Waghela, J.)

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